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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NGHE NGUYEN,

Defendant and Appellant.

B250323

(Los Angeles County  
Super. Ct. No. BA402406)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Barbara R. Johnson, Judge. Affirmed.

H. Russell Halpern, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney  
General, Steven E. Mercer and Tannaz Kouhpainezhad, Deputy Attorneys General, for  
Plaintiff and Respondent.

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Defendant and appellant, Nghe Nguyen, appeals his conviction for premeditated attempted murder, assault with a deadly weapon (three counts) and mayhem, and with deadly weapon use and great bodily injury findings (Pen. Code, §§ 664, 187, 245, 203, 12022, subd. (b)(1), 12022.7, subd. (e)).<sup>1</sup> He was sentenced to state prison for a term of 16 years.

The judgment is affirmed.

## **BACKGROUND**

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

### *1. Prosecution evidence.*

On September 9, 2012, defendant Nguyen, his wife Buu T., and their adult daughter Diemmy were living on Eastlake Avenue in Los Angeles. Nguyen and Buu had been married for more than 20 years, but they divorced in 2008. Nguyen began a relationship with another woman after the divorce, but he later moved back in with Buu because he needed a place to stay. He and Buu slept in separate bedrooms.

About 7:30 p.m., Diemmy picked Buu up from work and brought her home. As Buu began preparing food for dinner, she told Nguyen that she and Diemmy were going to move out without him. Nguyen got mad. Diemmy, who was setting the dinner table, was listening to their conversation and then she heard a noise like “something striking something.” Buu testified she had been hit with something and knocked to the floor. Diemmy turned and saw Nguyen repeatedly hitting Buu in the back of the head with a stool. Buu fell to her knees on the kitchen floor. The wooden seat of the stool, the part striking Buu’s head, broke off.

Diemmy intervened, pushing Nguyen away from Buu. Nguyen hit Diemmy with the stool, knocking her to the floor. Nguyen then dropped the stool and picked up a wooden-handled meat cleaver from a drawer next to the stove. He began hitting Buu on the top of the head with the cleaver. He struck her more than three times, “chopping

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

down strongly.” Diemmy testified Buu was bleeding and “the skin of [her] scalp was falling off and also parts of [her] hair.” Diemmy tried to get up to help her mother, but she kept slipping “[b]ecause it was bloody all over the floor.” When Diemmy was finally able to reach Nguyen she tried to push him away, but he raised the cleaver very high and swung it at her. Buu intervened, however, and managed to push Diemmy out of the way, which caused the cleaver to strike Buu’s shoulder. Nguyen grabbed Buu and continued cutting her with the cleaver. Nguyen said if they moved out without him, he would kill them. Nguyen dropped the wooden-handled cleaver and grabbed a larger metal-handled cleaver from the same drawer. He used this second cleaver to continue hacking at Buu’s head. Diemmy testified Nguyen “went on chopping on my mom” as Buu was trying to protect her head with her hands. Diemmy yelled, “Daddy, please stop.” Nguyen again “said that if we move out by ourselves without him, that he will kill both of us.” He kept hitting Buu with the cleaver.

Buu told Diemmy, “Just run out. Run out before your father kill[s] you.” Diemmy grabbed her cell phone and ran. Looking back, she could see Nguyen still hitting Buu with the cleaver. Buu was face down on the floor, not moving. Diemmy ran outside and called 911.

Diemmy testified at trial that she never saw Buu holding a knife or throwing anything at Nguyen during the incident.

Police officer Jai Sung and other officers responded to the 911 call and detained Nguyen. Sung testified Buu was lying face down on the floor:

“A. The top of [her] head was either cut off or peeled off by a sharp object. The scalp was peeled off completely towards . . . the forehead.

“Q. Okay. So when you’re looking . . . down towards [her], you can actually see where the scalp had come off and down?

“A. Yes.

“Q. Did you notice anything about [her] hands?

“A. There were four to five fingers either completely cut off, amputated, or – half of the fingers were cut off so the mere skin was holding . . . I should say, dangling, half of the fingers. That would be her right hand.”

Sung also testified:

“Q. Would it be fair to say that there was a lot of blood in that kitchen/living area?

“A. There was lot a blood [*sic*]. Full of blood on the floor.”

“Q. In addition to blood, was there any other liquid object . . . in the crime scene area?

“A. There was a fish tank. It was broken, and I’m assuming some water from the fish tank [was] on the floor. So along with the blood, there was a lot of water on the floor.”

Sung testified, “The blood was – I don’t want to say everywhere. It was on the floor, on the wall, on the ceiling, on the bath sink top. It was pretty much everywhere.” Diemmy had sustained injuries and bruising on her neck, back and leg from being hit by the stool. Nguyen had “minor scratches” on his “chest area and neck and . . . arm.” Sung found two meat cleavers in the kitchen. Officers found a couple of fingers, which they sent along to the hospital.

Jessica Reynolds, a general surgery resident at Los Angeles County Hospital, treated Buu’s head wounds in the operating room. She had “multiple lacerations over the top of her scalp extending down to the bone which was exposed in several places. We noticed that she also had some wounds lower on her head.” A wound on the back of her head was still bleeding. “She had deep cuts that went down to the bone as well as bone fractures, including places where the skull was depressed and fractured.” A “depressed part of the skull” is “an area where the skull has been pushed into the brain.” Buu had also sustained a “frontal scalp avulsion,” which meant “an area where the scalp was completely removed from the underlying bone. So sort of flapping.”

Buu was in the operating room for 14 hours, and then remained in the hospital for 40 days.

Dr. Joseph Carey, Chief of Plastic Surgery at Los Angeles County Hospital, testified he “was called to handle the replantation of the digits that were cut off from [Buu’s right] hand.” “That was the middle finger, index finger, ring finger, and the small finger. The middle finger was detached completely. The small finger was nearly completely detached without any blood supply, and the index finger was just a small piece of the tip.” “The index finger was a complete amputation through the tip of the finger approximately a centimeter-and-a-half down the finger.”

## *2. Defense evidence.*

At the crime scene, Detective Jose Rios spoke to Diemmy, who was shaken, scared and crying. She told him the attack had occurred right after Buu finished telling Nguyen that she and Diemmy were moving out, that “they were done with him.” Rios testified he saw the medics carry Buu from the house: “I thought she was deceased. She was face down on a gurney. . . . She was covered in blood.” Nguyen had some blood on him and his clothing was wet. Looking into the house, Rios could see “a whole bunch of blood.”

Nguyen testified on his own behalf. He had sponsored Buu to enter the United States in September 2007, and then in March 2008 they started divorce proceedings.

On the day of the incident, Buu refused to eat some food Nguyen had prepared, telling him: “I see your face. I lost my appetite.” She also said: “I won’t leave you in peace if you don’t get away,” to which Nguyen replied, “I already told you. I cannot go alone. I do not want to follow what you have decide[d].” A little later Buu asked Nguyen if he “had anything . . . going on with [the landlady], whose husband had just passed away. ‘If anything going on, you should tell me now.’ ” “[Buu] said, ‘If you have something to do with her or something going on with her, I would not leave you alone. I will not let you leave [*sic*] peacefully.’ ”

Then, while Nguyen was watching television, Buu stepped toward him with a knife and swung it at him. Nguyen managed to avoid the knife, which slipped out of Buu's hand and broke the fish tank. Diemmy ran into the room holding a pair of scissors. Buu reached for another knife from the drawer. Nguyen grabbed a chair to defend himself against Buu, who was holding the knife, and Diemmy, who was holding the scissors. Nguyen testified, "[B]oth of them were attacking me." He swung the chair to defend himself, not to hit anyone, and accidentally knocked Diemmy to the floor. Buu continued to swing the knife at him, so he pushed her with the chair. She fell to the floor, slipping on the water that had spilled out of the broken fish tank. Buu was still holding the knife. Nguyen tried to flee, but Buu grabbed his "private part" and caused him so much pain he thought he would die. Buu tried to use the knife to "cut it off," but Nguyen hit her with the chair two or three times. He ran outside. At that point, Buu "was still talking."

As Nguyen described this moment:

"Q. What was her physical condition when you left the room?

"A. I did not see. But I saw that it was wet all over.

"Q. What about blood? As you left the room, did you see blood?

"A. Did not see blood. Just water from the fish tank, kind of dirty, filthy."

Nguyen denied having touched the cleavers or any kind of knife that night. He insisted Diemmy had been lying when she testified he hit Buu with a meat cleaver.

The prosecutor asked:

"Q. . . . And when you last saw Buu, she was still talking?

"A. Yes.

"Q. Did you see Buu bleeding at all?

"A. I didn't pay attention. There was a lot of water.

"Q. Okay. No blood, just water?

"A. No. . . .

"Q. Okay. When you last saw Buu, was there anything wrong with her head?

"A. I was not paying attention. I was still running away."

The cross-examination continued:

“Q. Okay. So I’m showing you People’s 3-D, the top of Buu’s head. [¶] Do you have any idea how Buu’s head got cut up like that?

“A. I don’t know.

“Q. Okay. Was her head like that that night when the argument started?

“A. At that time, she was still having hair on.

“Q. Okay. And you have no idea how she got like this?

“A. I have no idea.

“Q. And did Buu have all of her fingers when you started the argument?

“A. Yes . . . she was still having her fingers.

“Q. I’m going to show you People’s 2. You saw that earlier. [¶] Do you have any idea how Buu’s fingers came off . . . in this picture?

“A. I don’t know.

“Q. Okay. I’m going to show you [another photograph] . . . [¶] Does that look like your kitchen floor?

“A. Yes.

“Q. Does that look like blood on your kitchen floor?

“A. I don’t know whether it’s water or blood because when I left . . . there was still water because – you know there was a 120 gallons of water in the aquarium.

“Q. Okay. But the aquarium water is either, like, clear or maybe some yellowish tint to it. It’s clear; right? It’s not red?

“A. It was very dirty. The water of the fish tank was dirty.

“Q. Was it red?

“A. Yes.”

The prosecutor also asked:

“Q. . . I’m holding up this picture. [¶] Do you see clumps of hair on the floor?

“A. Yeah. Here, here.

“Q. Okay. Do you have any idea how that got there?

“A. No. I was already outside.”

Nguyen testified Buu had not said anything about her and Diemmy moving out without him.

3. *Prosecution rebuttal evidence.*

Officer Ryan Nguyen assisted in interviewing Nguyen, who said the argument between him and Buu had been about money, rent, and that she was going to leave him and take their daughter. Nguyen did not say anything about Buu accusing him of cheating on him, or that she had grabbed his private parts. He did mention having seen blood in the house that night.

### **CONTENTIONS**

1. The trial court erred by instructing the jury with CALCRIM No. 361 because the instruction violated his constitutional rights.

2. The trial court erred by instructing the jury with CALCRIM No. 361 because the evidence did not support giving the instruction.

### **DISCUSSION**

1. *CALCRIM No. 361 does not violate the Constitution.*

Nguyen contends the trial court erred by instructing the jury with CALCRIM No. 361. He claims it is an incorrect statement of law and undermined his due process rights to a fair trial. This claim is meritless.

The trial court instructed the jury with CALCRIM No. 361 as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Nguyen acknowledges California courts have held there is nothing improper in CALCRIM No. 361. As *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, explained, CALCRIM No. 361 is substantially the same as CALJIC No. 2.62, which our Supreme Court, in *People v. Saddler* (1979) 24 Cal.3d 671, held did not violate due process.



“While the language of CALCRIM No. 361 differs somewhat from CALJIC No. 2.62, the reasoning of the Supreme Court in *Saddler* . . . applies with equal force to CALCRIM No. 361 because language preserving the presumption of innocence and explaining the prosecution’s burden of proof appears in each. We find no violation of appellant’s right to due process based on this instruction.” (*People v. Rodriguez, supra*, 170 Cal.App.4th at p. 1067.)

Nevertheless, Nguyen argues the instruction “undercuts the defendant’s testimony by implying that it should be scrutinized more closely than [*sic*] any other witness,” which “acts as a deterrent to” a defendant choosing to testify in his or her own defense. But this precise argument was rejected by *Saddler*: “Defendant also argues that the challenged instruction should never be given because it impermissibly singles out a defendant’s testimony and unduly focuses upon it. The same argument was rejected in *People v. Mayberry, supra*, 15 Cal.3d 143, 161. We noted there that the instruction was consistent with Evidence Code section 413 which permits the drawing of inferences from any party’s failure to explain or deny evidence against him. Since the only testifying ‘party’ in a criminal case is the defendant, the code section can have reference only to him.” (*People v. Saddler, supra*, 24 Cal.3d at pp. 680-681, fn. omitted.)

We agree with the Attorney General’s assessment that Nguyen “disagrees with the holding in *Rodriguez*, but provides no persuasive reason for this Court to revisit or reverse that decision.” We conclude CALCRIM No. 361 does not violate due process.

2. *Trial court properly gave CALCRIM No. 361 in this case.*

Nguyen contends that, even if CALCRIM No. 361 is a correct statement of law, the trial court erred by giving the instruction in this case. Nguyen argues that even if his testimony “may not have sounded reasonable or bordered on the bizarre,” there had been “no failure to explain or omission significant enough to warrant this instruction. It should be left to the trier of fact to determine which version to believe.”

a. *Factual background.*

There was graphic evidence at trial attesting to the extremely brutal injuries Nguyen inflicted on Buu. Diemmy testified that when Nguyen was chopping Buu’s head

with the meat cleaver, Diemmy saw the skin on Buu's scalp "falling off" and that Buu was bleeding "a lot." Diemmy also testified that after Nguyen knocked her to the floor she had trouble getting up "[b]ecause it was bloody all over the floor" and she kept slipping. Officer Sung testified "[t]he top of [Buu's] head was either cut off or peeled off by a sharp object" and "[t]here was a lot of blood. Full of blood on the floor." Detective Rios, who saw the medics carry Buu from the house, testified [s]he was covered in blood" and, looking into the house, he could see "a whole bunch of blood." Four of the fingers on Buu's right hand had been partially or completely severed. Her head lacerations extended down to the skull, which was exposed in several places. She was still bleeding from one of her head wounds after arriving at the emergency room, bleeding that was "coming from some of the deeper tissues."

On cross-examination, Nguyen was asked if he had seen Buu bleeding at all. He answered that he had seen only water, no blood. Asked if he had seen anything wrong with Buu's head when he last saw her, Nguyen testified: "I was not paying attention." The prosecutor asked if Nguyen had any idea how Buu's head had gotten cut, and Nguyen said he didn't know. He conceded Buu's fingers were healthy when the argument started, but he could not explain how they had been severed. Nguyen could offer no explanation for how Buu had been so horribly injured. The only explanation he offered for the pool of blood on the kitchen floor was that it was dirty red water from the broken aquarium.

During closing argument, the prosecutor characterized Nguyen's testimony as "completely unreasonable. To think that these two women attacked him, it's all Buu's fault, and he had no idea how Buu got hurt. And that all that blood, it's not really blood. It's red tank water. [¶] . . . And the fact that he can't explain that is really important. Because . . . for his story to ring true, either Buu did this to herself or some random person came in while he and Diemmy were out of the house[,] attacked Buu and then ran away. That does not make sense. That doesn't ring true."

b. *Discussion.*

“[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury. [Citations.]” (*People v. Mask* (1986) 188 Cal.App.3d 450, 455.) “When a defendant testifies but fails to deny or explain inculpatory evidence or gives a ‘bizarre or implausible’ explanation, the instruction is proper. [Citations.] ‘[T]he applicability of CALJIC No. 2.62 is peculiarly dependent on the particular facts of the case.’ [Citation.]” (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.)

Cases have found the instruction was properly given in the following situations: *People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [“Defendant testified he struck McConnell the one blow to the head with the bar, and that she fell to the ground but was ‘still breathing.’ But he failed to explain the autopsy surgeon’s conflicting conclusion that the injury resulting therefrom in probability would not have rendered McConnell unconscious, nor how the victim would come to have suffered the many defensive wounds – clearly evidencing her struggle for life as she was being beaten – if his version was true.”]; *People v. Sanchez, supra*, 24 Cal.App.4th at p. 1030 [“Appellant gave detailed and specific testimony about his prolific consumption of alcohol and cocaine during the afternoon of [the murder], but had no memory of inculpatory events during that same afternoon: he [did not] remember tying the victim’s wrists and elbows; he [did not] remember double-looping the rope around the victim’s neck and strangling her; he [did not] remember *seeing* the noose around the victim’s neck after he had strangled her (he saw only her ‘eyes’) . . . .”]; *People v. Mask, supra*, 188 Cal.App.3d at p. 455 [“Defendant offered an implausible explanation for his presence near the scene of the crime. . . . Even if we assume defendant took an inordinately long time in his travels, there are approximately three hours for which defendant was unable to account. Thus, his story was inherently implausible . . . .”].)

There is no dispute Nguyen was present at the crime scene. He acknowledged having fought with Buu. His version of the fight, however, was directly contradicted both by the testimony of Buu and Diemmy, and by the physical evidence. Asked by the prosecutor to explain how Buu could possibly have sustained her injuries under Nguyen's version of events, Nguyen failed to offer anything other than unbelievable and fantastical explanations, essentially saying he just hadn't noticed her catastrophic injuries and all the resulting blood.

The trial court did not err by instructing the jury with CALCRIM No. 361 in this case.

### **DISPOSITION**

The judgment is affirmed.

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EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.